Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of the Verizon Telephone	)	
Companies for Forbearance under	)	WC Docket No. 04-440
47 U.S.C Sec. 160(c) from Title II	)	
and *Computer Inquiry* Rules with respect to	)	
Their Broadband Services	)	

COMMENTS OF
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") submits these comments concerning the above-captioned petition filed by the Verizon Telephone Companies ("Verizon") requesting that the Commission forbear from application of *Computer Inquiry* obligations and Title II regulation in its entirely to "broadband" services provided by incumbent local exchange carriers.[1] Verizon's petition states that it is seeking the same relief requested in the earlier petition filed by BellSouth,[2] and it relies on the same reasons advanced by BellSouth in its petition, as observed by the Commission in requesting comments on the Verizon petition.[3] McLeodUSA fully responded to, and opposed, the BellSouth petition.[4] In order to permit more

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[1] *Comments Invited On Petition for Forbearance Filed By the Petition for Forbearance With Respect to Their Broadband Services*, Public Notice, WC Docket No. 04-440, DA 04-0409, released December 23, 2004. ("*Verizon Petition Public Notice*").

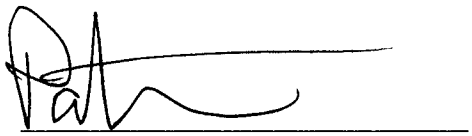
[2] Verizon Petition at 2. *Comments Invited on Petition for Forbearance Filed by BellSouth Telecommunications, Inc. Regarding Incumbent LEC Provision of Broadband*, Public Notice, WC Docket No. 04-405, DA 04-3507, released November 3, 2004).

[3] *Verizon Petition Public Notice* at 1.

[4] Comments of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-405, December 20, 2004.

efficient consideration of the petitions, and to facilitate their prompt denial, McLeodUSA attaches its earlier filed comments concerning the BellSouth petition as its comments for purposes of its initial comments concerning the Verizon "me too" petition. McLeodUSA reserves the right to file more extensive reply comments in this proceeding.

Respectfully Submitted,



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Petition of BellSouth Telecommunications, Inc.	)	
For Forbearance Under 47 U.S.C Sec. 160(c)	)	WC Docket No. 04-405
from Application of Computer Inquiry and	)	
Title II Common-Carriage Requirements	)	

COMMENTS OF MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

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Dated: December 20, 2004

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Summary

BellSouth's petition fails to meet the statutory standards for forbearance. The *Computer Inquiry* safeguards and Title II remain necessary to protect against unreasonable discrimination because there is at best a duopoly for the provision of residential broadband services. The Commission has repeatedly found duopolies insufficient to discipline carriers with market power. Intermodal competition from new technologies such as WiMax or BPL and older technologies such as fixed wireless and satellite have yet to demonstrate the ability to serve as substantial competitors in the residential broadband market. (need something about the business market). Contrary to BellSouth's contentions, the IP-enabled marketplace will create strong incentives for BOCs to harm independent providers, especially with respect to VoIP, which will compete with BOCs' core services. *Computer Inquiry* and accounting safeguards as well as application of Title II remain essential to assure that BellSouth and other incumbents are not able to discriminate in favor of their own IP-enabled services.

The requested forbearance would harm consumers. The presence of residential cable broadband services does not discipline BellSouth's powerful incentive to use its control over bottleneck broadband transmission facilities to stifle future growth of third party VoIP services. And the minimal costs of Bellsouth's compliance with the *Computer Inquiry* safeguards is worth the continued advancements in innovation, investment and competition that result.

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Dated: December 20, 2004

For the reasons stated below, McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") requests that the Commission deny the above-captioned petition filed by BellSouth Telecommunications, Inc.

I. THE COMMISSION SHOULD BE GUIDED BY THE GOAL OF ENCOURAGING THE DEVELOPMENT OF IP-ENABLED SERVICES

In the *IP-Enabled Services NPRM*, the Commission announced the goal of facilitating the transition to an IP-enabled telecommunications marketplace.[1] The Commission predicted that the rise of IP-enabled communications would lead to numerous revolutionary beneficial changes including reductions in the cost of communication, innovation, and individualization of services. McLeodUSA agrees with the Commission's prediction. McLeodUSA is actively exploring participation in the IP-enabled market.

In this connection, the Commission should evaluate BellSouth's remarkably candid request that it be permitted to discriminate in favor of its own affiliated VoIP operations, and against independent providers, and to cross-subsidize its own operations, in light of the obviously harmful impact on the still nascent IP-enabled marketplace. As explained in these comments, BellSouth could and would use the relief requested in its petition to harm competitors. This, in turn, would retard, or entirely preclude, the beneficial developments predicted in the *IP-Enabled Services NPRM*.

In light of the goal of facilitating the development of competitive IP-enabled services, the Commission should deny BellSouth's petition.

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[1] *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4867¶ 5 ("*IP-Enabled NPRM*").

II. CONSUMERS, COMPETITORS, AND COMPETITION WOULD BE SERIOUSLY HARMED IF BELLSOUTH COULD DISCRIMINATE IN FAVOR OF ITS OWN VOIP AND IP-ENABLED OPERATIONS

A. Computer Inquiry Safeguards Remain Valid in the Broadband Marketplace

While some of the details of *Computer Inquiry* regulation may be ripe for reevaluation, the core principles of the existing scheme – consumer access to information services providers on an open and nondiscriminatory basis – remains an essential component of Chairman Powell's policy of "Net Freedom," in which "ensuring that consumers can obtain and use the content, applications and devices they want is critical to unlocking the vast potential of the broadband Internet."[2] The Chairman explained:

> Today, broadband consumers generally enjoy such internet freedom. They can access and use the content, applications and devices of their choice. This easy access includes some of the most promising new uses of broadband. For example, the head of the National Cable and Telecommunications Association recently stated that cable modem providers would not block traffic from competing Internet voice providers, such as Vonage. ... Nevertheless, [the Commission] must keep a sharp eye on market practices that will continue to evolve rapidly. ... Preserving "Net Freedom" ... will serve as an important "insurance policy" against the potential rise of abusive market power by vertically-integrated broadband providers.

As demonstrated below, BellSouth is precisely one of these "vertically-integrated broadband providers" that has the ability to take away consumers' Net Freedom to access content, applications and devices of their choice. In considering BellSouth's petition, the Commission must take extreme care that it does not surrender the future of innovation and development of consumer broadband services and applications to the mercy of the broadband infrastructure companies – companies that are often more adept at protecting entrenched services

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[2] *Preserving Internet Freedom: Guiding Principles for the Industry*, Silicon Flatirons Symposium on "The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age" Remarks of Chairman Michael K. Powell Feb. 8, 2004 at p. 3.

than developing new ones. Consumers should not be left to depend on a duopoly to define the entirety of their broadband future. Chairman Powell, in explaining his vote not to approve the proposed DirecTV-EchoStar merger, reasoned that a duopoly market cannot be expected to deliver the benefits of innovation and unfettered competition to consumers:

> At best, this merger would create a duopoly in areas served by cable; at worst it would create a merger to monopoly in unserved areas. Either result would decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers. That is the antithesis of what the public interest demands.[3]

Relatedly, Commissioner Abernathy has explained:

> [O]ur *Computer II/III* rules played a key role in fostering a robustly competitive ISP market in which consumers can choose from a wide range of providers. Thus, while I intend to examine the record with an eye toward streamlining wholesale regulations where possible, I am committed to preserving regulations to the extent necessary to safeguard competition and consumer choice.[4]

These principles articulated by Chairman Powell and Commissioner Abernathy provide the context within which BellSouth's request to exempt itself from the entirety of Title II and the *Computer Inquiry* obligations must be examined and rejected

B. IP-Enabled Broadband Services Will Compete With BellSouth's Service Offerings and Thereby Increase Incentives For Discriminatory Conduct

As CLECs begin to provide VoIP and other IP-enabled services, BellSouth will have strong incentives to harm CLECs by discriminating in favor of its own VoIP services. CLEC VoIP service will compete with BellSouth's existing local and long-distance offerings, and will also compete with future BellSouth VoIP services. The number of incumbent LEC circuit-

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[3] *Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Transferors, and EchoStar Communications Corporation, Transferee*, CS Docket No. 01-348, Hearing Designation and Order, FCC 02-284, Separate Statement of Chairman Michael K. Powell (rel. Oct. 18, 2002).

[4] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket 02-33, Notice of Proposed Rulemaking, Separate Statement of Commissioner Kathleen Q. Abernathy (February 14, 2002).

switched access lines has recently been in decline.[5] The market for VoIP services has grown significantly from 2003 through 2004. VoIP subscribership now exceeds 4 million customers,[6] and is expected to grow to 18 million subscribers by 2008.[7] While CLEC VoIP services have so far not been a major cause of ILEC line losses, CLEC VoIP will likely significantly compete with traditional incumbent voice services. Thus, BellSouth has strong incentives to thwart provision of CLEC VoIP by providing service on favorable terms and conditions to its own VoIP service.

Even if some IP-enabled services would not compete with traditional services, incumbents would have strong incentives to disadvantage competitors in the race to develop and provide the new IP-enabled services, such as video IP, and enhancements to more traditional services envisioned by the Commission in the *IP-Enabled NPRM*. These new markets are a major market opportunity, which BellSouth and other incumbents would like to deny to competitors.

BellSouth has demonstrated its willingness and ability leverage its strength in the broadband access market to suppress competition. For example, BellSouth refuses to sell ADSL service at any price to end-user consumers who do not also purchase BellSouth's circuit-switched traditional voice service. The purpose of BellSouth's DSL tying policy is to discourage consumers from using alternative voice services such as VoIP or wireless services.[8]

BellSouth's proposal to eliminate all of its Title II and *Computer Inquiry* obligations, which have served as a cornerstone of the nation's Internet policy for a quarter-century, marks its

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[5] *See, e.g., Trends in Telephone Service*, Industry Analysis and Technology Division, Wireline Competition Bureau (rel. August 7, 2003) at Table 7.1.

[6] *See* Merrill Lynch, *Everything Over IP: VoIP—and Beyond*, at 20 (March 12, 2004) ("*Everything Over IP*").

[7] *Id.*

[8] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Comments of BellSouth Corporation at 46 (April 8, 2003).

attempt to open another front in its effort to limit consumer choice. BellSouth itself has elsewhere explained that "[c]losing the market to a competitor not only unfairly punishes that competitor, but also punishes consumers because it limits their choice and thus increases price and delays availability."[9] Yet BellSouth's proposal would strengthen its hand to attempt exactly that result. Even before the Commission has considered whether it can or should establish alternative safeguards, BellSouth's proposal would give free rein to its ability to harm competitors by permitting it to establish special relationships with its own IP-enabled operations, deny them to independent providers or even to deny access altogether to alternative providers.

BellSouth's statements that the *Computer Inquiry* safeguards inhibit its ability to make beneficial discriminations in favor of ISPs with specialized needs does not reduce concerns about harmful discrimination. Assuming this is an accurate description of the impact of the *Computer Inquiry* safeguards, such "good" incentives to help specialized ISPs could not possibly outweigh its much stronger incentives to harm the vast majority of CLECs that use basic transmission services such as DSL.

C. Harm to CLECs Will Be Exacerbated By Broadband Unbundling Relief

BOCs ability to harm CLEC VoIP providers will unfortunately be enhanced because of the broadband unbundling relief adopted by the Commission in the *Triennial Review Order*. The limited ability of CLECs to obtain broadband UNEs to serve the mass market will seriously harm CLECs ability to provide IP-enabled services to that market. Further, because CLECs are nonetheless impaired in their ability to serve that market without broadband UNE access, CLECs will not realistically be able to construct their own broadband network elements. In light of these

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[9] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Comments of BellSouth Corporation, (April 8, 2003) at 46 ("Closing the market to a competitor not only unfairly punishes that competitor, but also punishes consumers because it limits their choice and thus increases price and delays availability.")

practical difficulties and unbundling limitations, CLECs' VoIP operations will be particularly vulnerable to BOC efforts to favor their own VoIP operations while potentially denying DSL and other access, or offering it on less favorable terms, to CLECs in comparison to what the BOC provides to itself.

III. THE STATUTORY STANDARDS FOR FORBEARANCE HAVE NOT BEEN MET

When Congress amended the Communications Act in 1996 it provided the Commission significant tools to strip away outdated regulations that no longer promoted competition but stifled it. But Congress in no way intended that the Commission would use the forbearance provisions of the Act to undermine the very structure of the Act. BellSouth's petition is no more than a thinly veiled attempt to obtain, through forbearance, what the Commission is addressing in its rulemaking proceeding; reclassification of ILEC DSL transmission service as an "information service" rather than as a "telecommunications service." Apart from attempting an end run on the Commission's measured decision to await the ruling from the Supreme Court on the related *Brand X* case, BellSouth's petition is obviously defective on the merits and should be denied.

The Commission has made it clear that under Section 10, the Commission "cannot assume, that absent [the provision or regulation] market conditions or any other factor will adequately ensure that the charges, practices, classifications and services ... are just and reasonable and not unjustly or unreasonable discriminatory."[10] BellSouth's petition, however, is long on assumption, and short on empirical evidence to support its claims that consumers and the ISPs that serve them have sufficient intermodal competitive alternatives so that eliminating the

[10] *1998 Biennial Regulatory review-review of ARMIS Reporting Requirements,* Report and Order, *Petition for Forbearance of the Independent Telephone and Telecommunications Alliance*, Fifth Report and Order,14 FCC Rcd 11443 ¶ 32 (1999).

Computer Inquiry safeguards and the panoply of Title II regulation would not lead to the imposition of anti-consumer and anti-competitive practices and rates in the broadband market.

The forbearance provisions of the Act in Section 10 provide:

> the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that--
>
> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.

The legal framework for the Commission to evaluate BellSouth's Section 10 petition is firmly established under Commission and D.C. Circuit precedent. First, the test under Section 10 is conjunctive. The Commission must "deny a petition for forbearance if it finds that *any* one of the three prongs is unsatisfied."[11]

The statute further requires the Commission to tailor its forbearance findings to specific markets or specific carriers. Section 10 directs the Commission to forbear only "in any or some" of the markets where the petitioner shows the forbearance criteria are met. In other words, the statute expects that the petition and the Commission's analysis will be sufficiently granular and will not make broad sweeping regulatory pronouncements where narrower findings are more appropriate. Of course this approach is consistent with judicial guidance regarding the

[11] *CTIA v. F.C.C.*, 330 F. 3d at 509 (emphasis supplied) (FCC was correct in denying petition to forbear from applying wireless local number portability under 10(a)(2) without addressing other two provisions under 10(a)).

appropriate geographic market for assessing entry barriers in the local telecommunications market.[12] To assess properly whether a carrier possesses market power, the Commission has found that "the proper market aggregates those consumers with similar choices regarding a particular good or service in the same geographic area."[13] For purposes of BellSouth's petition, for example, if the Commission determines that regulation is no longer necessary to protect consumers who can choose between an ILEC's DSL service and cable modem service, it must consider separately whether the same is true for the many consumers who lack access to cable broadband services but do have access to DSL service.

If for no other reason, the Commission should deny BellSouth's petition because it has failed to identify specific product or customer markets for which it seeks relief. It has failed to identify or separately address voice versus broadband or enterprise versus mass market services.

Assuming the Commission does not dismiss the petition, the Commission should ensure that its analysis is limited to the appropriate product market. As it has in analyzing carrier petitions for non-dominant regulatory classification, the Commission should analyze the product market for DSL services using substitutable services. For example, rather than sweep all of BellSouth's broadband service into one product market, the Commission is obligated to consider separately the forbearance petition for business customers and residential customers because the services are not substitutable. Likewise, the Commission's recent *Advanced Services Report* makes clear that there are differences in the residential and business market that warrant analysis in separate product markets.[14]

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[12] *USTA v. FCC, 290* F.3d 415, 426 (D.C. Cir. 2002).

[13] *WorldCom v. F.C.C.*, 238 F. 3d at 461 *citing* NYNEX, 12 FCC Rcd. 19,985 ¶ 54.

[14] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54, Fourth Report to Congress, FCC 04-208, (rel. Sep. 9, 2004) ("*Fourth Advanced Services Report*").

A. *Computer Inquiry* Safeguards Are Necessary to Assure that ILEC Charges, Practices, Classifications, and Relations Are Just and Reasonable and Not Unjustly Discriminatory

When the Commission reviewed the *Computer Inquiry* safeguards in 1999, it determined that "until full competition is realized, certain safeguards may still be necessary."[15] BellSouth's petition, in effect, claims that competition between ILECs and incumbent cable companies for broadband transmission services in the residential market, each with a virtually monopoly market in their primary line of service, somehow amounts to the "fully competitive market" for information services envisioned when the Commission first crafted the *Computer Inquiry* safeguards over thirty years ago. There is simply no basis in law or policy that would justify the dismantling of the regulatory framework responsible for the development of the Internet and robust competition in the information services market.

BellSouth suggests that competition from cable companies in the broadband market alleviates any need for the Commission to retain the *Computer Inquiry* safeguards.[16] This claim is based on BellSouth's theory that cable company share of the market for broadband is dispositive of the Section 10(a)(1) analysis. In other words, BellSouth claims because cable has a higher market share in the residential broadband market that BellSouth lacks the market power to charge unreasonable rates , impose unreasonable practices, or deny and frustrate access to third party information services not only in the residential market but in any market. There are multiple problems with BellSouth's approach. First, evidence of BellSouth's market share is not by itself sufficient to demonstrate that the BellSouth has met the forbearance criteria. To assess market power in this instance, the Commission must adhere to the market power analysis it

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[15] *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket 95-20, *1998 Biennial Regulatory Review—Review of Computer III and ONA* Requirements, CC Docket 98-10, Further Notice of Proposed Rulemaking 13 FCC Rcd 6040, 6046 ¶ 7 (1998).

[16] Petition at 17.

traditionally employs when evaluating whether a carrier is non-dominant. BellSouth offers no evidence on any of the factors enumerated in such cases except for market share, and its evidence on market share does not support its claims.

1. RBOCs Have Market Power in the Provision of Broadband

Antitrust law and Commission precedent establishes how the Commission should assess whether a carrier's possesses market power. Market power is typically defined as a firm's ability to "exclude competition" or "-control prices."[17] The law makes clear that the assessment of whether BellSouth has market power in the broadband services market does not fall solely on BellSouth's market share.[18] Rather as the Commission and the courts have explained the Commission must look to a broader inquiry. In *AT&T v. F.C.C.*, the D.C. Circuit reversed the determination that a firm's market power was dispositive where the Commission did not address other factors enumerated in nondominance cases.[19] BellSouth's petition makes no mention of any other factors except market share. Because BellSouth's petition on its face offers no evidence on any dispositive issue except market share, the Commission should dismiss the petition.

The Commission "has never viewed market share as an essential factor.[20] It has even concluded that "market share can be irrelevant where there is other evidence of lack of market power."[21] Other measures of competition in the market for broadband further erode the already

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[17] *United States v. E.I. duPont Nemours & Co.*, 351 U.S. 377, 391 (1956).

[18] *See United States v. General Dynamics*, 415 U.S. 486, 498, (1974); *see also AT&T v. FCC*, 236 F.3d 729, 736 (D.C. Cir. 2001).

[19] *AT&T v. FCC*, 236 F.3d at 729.

[20] *Id.*

[21] *Id.* at 735, *citing COMSAT Corp., Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, 13 FCC Rcd 14083, 14,139 ¶ 111 (1998) ("*COMSAT Non-Dominance Order*").

shaky foundation that BellSouth attempts to lay in its petition. For instance the Commission's competition analysis typically considers demand and supply elasticities. *i.e.*, how consumers can substitute other services for the service in question, or how new entrants and existing competitors can add capacity to serve consumers that abandon supracompetitive priced ILEC provided broadband.

a. Market Share Analysis Demonstrates that in Most Markets BellSouth is either a Monopolist or a Duopolist

Evidence in the Commission's possession and evidence provided in other related proceedings shows that in the vast majority of markets there are no more than two facilities-based providers of broadband service.[22] In many markets, ILEC DSL service is the only broadband service available because cable is typically not available, for instance in rural areas and in business markets in all geographic markets. BellSouth's petition conveniently ignores any distinction between the mass market and enterprise markets. Likewise, other broadband platforms at this point show no signs of developing into viable substitutes for ILEC broadband service or cable modem service.

BellSouth asserts that the limited intermodal competition between cable and ILEC DSL means that consumers have the benefit of "rates that are just and reasonable."[23] BellSouth's contention is wrong both on the facts and wrong on the law. Marketplace evidence suggests that the limited duopoly competition between cable and ILEC DSL is not sufficiently competitive to impact the rates and practices of duopoly firms. Traditional competition doctrine requires three

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[22] *See Fourth Advanced Services Report* at 30, chart 8 (demonstrating that 53.7% of U.S. zip codes have three or fewer broadband service providers; after removing wide-ranging satellite and other wireless broadband service providers from this analysis (such providers account for only 0.4% of the broadband market, but can cover large service areas), a duopoly of broadband access is clearly evident in most U.S. markets).

[23] Petition at 19.

or more relatively equal size market participants offering substitutable services before a market can be deemed sufficiently competitive.[24]

Wall Street reports confirm this analysis. For instance Merrill Lynch suggests:

> If "light" regulation prevails, pricing could go even lower. The stakes here are very high – a multi-provider VoIP market likely implies aggressive competition and thin margins. This is a worse outcome for telcos (and for cable) than a more stable market structure with one principal competitor to the telcos."[25]

Merrill Lynch elsewhere explains that the current market for broadband is at best a two-company market and that "the risk is that a two-player market for broadband data services becomes a multi-player market."[26]

While Wall Street may prefer "a more stable market structure" with inflated prices and a duopoly where the principal market participants can coordinate pricing and exclude new entrants in order to increase earnings and profits, such superficial competition is not in the interest of the American consumers.

BellSouth contends that the superficial competition between cable and DSL has led to a price war. However, the RBOCs have raised prices. SBC raised prices for its lowest tiered DSL service approximately 10%.[27] Further, if the BOCs faced serious, rather than superficial, competition they would not illegally tie the offering of DSL to use of their monopoly local exchange voice service.[28]

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[24] *Echostar Merger Order* at 20604 ¶¶ 99-101.

[25] Merrill Lynch, *Everything Over IP: VoIP—and Beyond*, at 3 (March 12, 2004) ("*Everything Over IP*").

[26] *Id.* at 4.

[27] *Everything Over IP* at 11.

[28] *See generally BellSouth Telecommunications, Inc., Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers*, WC Docket 03-251, Comments of FDN Communications, filed Jan. 30, 2004 ("*FDN DSL Tying Comments*").

While competition between cable and DSL is insufficiently competitive, there are, however, many markets where a substantial percentage of residents can only obtain DSL.[29] Of course there is no competition from cable outside the mass-market, where the ILECs continue to control vital bottleneck last mile transmission facilities. Cable has little if any viable presence in the small business market, losing market share in 2003 and reaching only 4.2% of the remote office market.[30] Thus it is not surprising that analysts conclude that "DSL operators dominate the U.S. [small business] broadband and enterprise remote-office broadband market."[31]

There is even less support for BellSouth's dubious claim that fixed wireless technologies, satellite or Broadband over Power Line ("BPL") present either current or near term competition sufficient to discipline ILECs anticompetitive behavior in the broadband market. There is no compelling evidence that consumers view these services, some of which have not even been offered on a widely available commercial basis, as substitutes for DSL or cable broadband. According to the Commission's own data, the combined market share for broadband technologies other than cable or DSL has decreased since 1999. These statistics show that fixed wireless and satellite combined now have 1.3% of the market compared to 2.8% in 1999,[32] and analysts expect little movement upwards.[33] Other technologies such as WiMAX, mobile wireless and BPL have not been deployed on a generally available commercial basis, if deployed

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[29] *IP-Enabled Services*, WC Docket 04-36, Competition in the Provision of Voice over IP and IP-Enable Services, attached to Letter to Marlene H. Dortch from Evan Leo, Counsel for BellSouth, SBC, Qwest and Verizon, (filed May 28, 2004) at A2 ("*RBOC Report*").

[30] Yankee Group, *Cable and DSL Battle for Broadband Dominance*, (February 2004) at 4-5.

[31] *Id.* at 4.

[32] Commission High Speed Report Tables 1-4.

[33] *See* Gartner, Inc., *Consumer Telecommunications and Online Market*: United States 2002-2007 (Dec. 2003) at 3.

at all.[34] The Commission cannot seriously entertain the theory that these technologies, whose commercial viability the market has not yet tested, can actually restrain the ILEC's anti-competitive behavior should the Commission eliminate the Title II and *Computer Inquiry* safeguards.

b. A Supply and Demand Elasticity Analysis Confirms BellSouth's Market Power

BellSouth's claim that the Commission should eliminate the *Computer Inquiry* safeguards rests almost exclusively in its claim that it lacks market power due to its share of the market. However the Commission and antirust authorities have found that alone, market share is an imperfect gauge of market power because each market should be evaluated in terms of access to alternative sources of supply.[35] Thus the Commission's analysis regarding market power evaluates other factors as well, namely the elasticities of supply and demand.

The Commission examines supply elasticity in order to "determine the ability of alternative suppliers in a relevant market to absorb a carrier's customers if such a carrier raised the price of its service by a small but significant amount and its customers wished to change carriers in response."[36] The Commission examines two factors in assessing supply elasticity, the "supply capacity of existing competitors" and "entry barriers."[37] Based on an analysis of these

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[34] See RBOC Report at A13. WiMax faces significant obstacles before the Commission can asses whether it might emerge as a serious broadband competitor. *See* Bear Stearns, *US Wireline/Wireless Services* (June 2004) at 5. WiMax will have "limited impact on wireline carriers in the near term.") While power companies are experimenting with BPL, deployment is limited to trial markets, and it is unclear whether powerline infrastructure will be capable of supporting a service truly substitutable for cable or telco broadband. Analysts expect BPL to have only 220,000 subscribers nationwide by 2008. *See* In-State/MDR, *Reaching Critical Mass* at 22. While the RBOCs hype mobile wireless 3G competition, RBOC Report A18, analysts suggest the technology is immature, Bear Stearns, *U.S. Wireline/Wireless Services* (June 2004) at 47; with slow speeds and high costs, *Everything Over IP*, at 41 Table 12.

[35] *See United States v. General Dynamics*, 415 U.S. 486, 498, (1974).

[36] *Comsat Non-Dominance Order*, at 14123 ¶ 78.

[37] *Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3293 ¶ 38 (1995) ("*AT&T Non-Dominance Order*").

factors in the relevant geographic and product markets, supply elasticity in the residential broadband market is low. In examining supply capacity the question is "whether existing competitors have or can relatively easily acquire significant additional capacity" in a relatively short time period.[38] Most competitors in the broadband market competitors currently don't have enough capacity. As discussed elsewhere in these comments, no other competitor to ILEC broadband has demonstrated the ability to garner significant market share. In other words, it is not likely that such competitors, lacking the scale or scope of the RBOC broadband network could easily add capacity to serve a large influx of customers from the ILEC services should the ILECs charge supracompetitive rates to otherwise exercise their market power to raise prices.[39] Regardless of demand elasticity, the market for broadband services in all business markets is not competitive largely because BellSouth and other RBOCs control the overwhelming majority of the bottleneck transmission facilities needed to provide broadband service.

Nor are the entry barriers low enough to demonstrate that in the event BellSouth introduced supracompetitive prices a new entrant could efficiently enter the market and begin serving customers fleeing BellSouth's service. Indeed, one of the fundamental reasons McLeodUSA has an interest in this proceeding is because they know that they are unable to deploy their own loops to most customers, and are considering the option of purchasing broadband transmission from ILECs in the event that UNE loops are not a viable option for reaching particular customers. The Commission stated clearly in the *TRO* that deployment of loops to provide broadband is an "expensive and time consuming" undertaking.[40] The

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[38] *Comsat Non-Dominance* Order at 14123 ¶ 78; *AT&T Non-Dominance Order* 3303 ¶ 57-8.

[39] *Compare AT&T Non-Dominance Order,* at 3303-3306, ¶¶ 57-64.

[40] *Triennial Review Order,* ¶ 205.

difficulties in developing a robust third pipe further confirms the high entry barriers in the broadband market.

Even where competitors could add new capacity through new entry or expansion by existing entrants, demand in the broadband market is inelastic. Demand elasticity refers to "the willingness and ability" of ILEC "customers to switch to another ... service provider or otherwise change the amount of services they purchase ... in response to a change in the price or quality of ... service."[41] Competitors have provided the Commission with evidence that switching broadband providers is problematic, requiring high costs to change equipment and e-mail addresses making it less likely that consumers faced with anticompetitive pricing or practices could flee for another competitor.[42] In short, the supply and demand elasticities confirm that BellSouth and the RBOCs retain market power in the broadband market, regardless of the cable company market share in the non-rural residential market.

2. *Computer Inquiry* Safeguards Against Discrimination and Cross-Subsidization Remain Necessary

As long as the companies that own broadband transmission facilities can exercise market power, they will exercise that market power to control downstream markets that rely on those transmission faculties. When faced with competition for their core voice services, the RBOCs, as described earlier in these comments, have a strong incentive to exercise their control over broadband transmission facilities to drive non-affiliated VoIP providers out of the market or raise their cost of providing service to frustrate their ability to compete.

In this connection, the Commission's approach in addressing BellSouth's petition must squarely address the ultimate aim of BellSouth's petition -- to stifle innovate VoIP services and

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[41] *Comsat Non-Dominance* Order 14120 ¶ 71.

[42] AT&T Reply Comments, WC Docket 04-36 at p. 43.

protect its legacy monopoly over traditional POTS. In the *Computer Inquiry,* the Commission adopted safeguards to prevent dominant carriers from leveraging their control over bottleneck facilities into dominance of a market that was competitive, namely the enhanced services or information service market. The Commission's decisions to limit ILEC and RBOC unbundling obligations for broadband network elements likewise were purportedly aimed at eliminating barriers to further deployment of broadband networks to provide services in a market where the ILEC purportedly is not dominant. In this proceeding, however the Commission must consider that ILEC control of bottleneck telecommunications facilities without the safeguards adopted in the *Computer Inquiry* allows ILECs to stifle competition in the information services market to protect their monopoly in the local voice market from nascent competition from VoIP.

Likewise BellSouth has engaged in anticompetitive tying practices with respect to its DSL service. By forcing consumers that want DSL service from BellSouth to also subscribe to BellSouth's local exchange service, BellSouth first is seeking to retain its monopoly in the local exchange market. Because DSL is a desirable service that consumers want, they may be reluctant to change voice local exchange providers if that means giving up their DSL service. This is especially problematic throughout BellSouth's nine-state region where there is virtually no intramodal competition for DSL because BellSouth's DLC-based network limits competitive DSL service using UNEs.[43] Thus, FDN Communications, for example, has encountered resistance from local exchange customers to switch to FDN for this reason.[44] DSL customers that want to select another local exchange provider cannot do so because there is no suitable alternative for broadband.

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[43] *See* FDN DSL Tying Comments at 3.

[44] *Id.*

The RBOCs could conceivably attempt to deny VoIP providers access to bottleneck transmission facilities or offer VoIP providers substandard access. For example, as commenters suggest in the IP-Enabled Service proceeding there is now "technology that exists to enable network operators to recognize the data packets that move across their system and prioritize them. ILECs ... could block or assign a lower priority to packets from competing IP-enable service providers."[45]

a. Intermodal and Intramodal Competition For Provision Of Access Is Insufficient To Protect Against Discrimination, Cross-Subsidization and Other Unreasonable Practices and Unjust Rates

BellSouth claims that *Computer Inquiry* safeguards are unnecessary because ISPs may obtain access from intermodal or intramodal providers. However, the facts do not support BellSouth's position. There is neither intermodal competition from other transmission providers nor is there intramodal competition in most places for the transmission facilities on which ISPs rely in order to provide information services. The Commission has taken several steps to severely curtail the market for the telecommunications inputs ISPs require. The Commission has eliminated ILEC obligations to provide CLECs unbundled access to network elements used in the provision of broadband service, including line sharing, for serving mass market customers.[46] Similarly, the Commission has endeavored to insulate cable modem service providers from any obligation to provide ISPs with wholesale access.[47] Accordingly, there is no rational basis upon

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[45] *IP-Enabled Services*, WC Docket 04-36, Comments of Enterprise Commun Ass'n at 9 (May 28, 2004).

[46] *TRO*, 18 FCC Rcd 16978 (2003) ¶¶ 258-263 (eliminating line sharing) ¶¶ ¶¶ 274-277 (eliminating access to FTTH loops).

[47] The Commission's 2002 Cable Modem Declaratory ruling is currently pending before the Supreme Court. The Ninth Circuit vacated the ruling that cable modem service is an information service and found that it was instead a telecommunications service, based on the Ninth Circuit's treatment of the same issues in *AT&T v. Portland*. Regardless of the outcome the Commission has stated it has no intention of requiring cable modem providers to fulfill their obligations as telecommunications carriers under the Act and provide ISPs access to their underlying transmission services.

which the Commission could conclude that ISPs have assurance of alternatives to reach customers other than LEC Title II common carrier offerings.

BellSouth contends that the Commission's broadband reporting data demonstrates that cable is the dominant provider and that the RBOCs require relief in order to compete and that regulatory safeguards are no longer needed to restrain anticompetitive behavior. However, Commission data shows:

- ADSL growth outpaced cable growth in second half of 2003.[48]
- ADSL growth nearly doubled that of cable in second half of 2003 for residential and small business customers.[49]
- Cable market share has decreased in the Residential and small business market from 78.2% to 63.2%, while ADSL doubled from 16.3% to 34.3 %.[50]
- Between 2001 and 2003 DSL growth *doubled* that of cable: 181.8% to 90.9%[51]

In any event, Commission precedent and relevant antirust case law reinforces the view that the presence of two competitors with their own facilities is insufficient competition to assure that network providers will be unable to harm downstream competitors by discriminating in provision of access. The Commission has recognized that even if a retail market has multiple competitors, a single firm that controls essential facilities can exercise market power by leveraging its control of those facilities to "increase[e] its rivals' cost or by restricting its rivals' output.[52] The Commission has specifically found that ILECs possess such market power and thus "have the ability and incentive to use their bottleneck facilities to engage in cost

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[48] High Speed Services for Internet Access: Status as of December 31, 2003 (June 2004) at Table 1.

[49] *Id.* at Table 3.

[50] *Id.*

[51] National Telecommunications and Information Administration, *A Nation Online: Entering the Broadband Age* at 6 (Sept. 2004).

[52] LEC Classification Order, 12 FCC Rcd 15756 ¶ 83 (1997).

misallocation, unlawful discrimination or a price squeeze."[53] Similarly in addressing the ILEC ability to exercise its market power in the broadband market, the Commission found that because ILECs "compete with other providers of advanced services they have an incentive to discriminate against companies that depend on them for evolving types of interconnection and access arrangements necessary to provide new service to consumers."[54]

The Commission has clearly articulated a policy that three or more providers owning their own facilities is a prerequisite before a market can be viewed as sufficiently competitive so that the Commission can remove regulatory safeguards. In its order that effectively derailed he proposed merger between the two rival satellite television firms, the Commission stated "existing antitrust doctrine suggests that a merger to duopoly .... faces a strong presumption of illegality.[55] Similarly in the context of its *Media Ownership Proceeding* the Commission articulated that "economic theory and empirical studies" show that "five or more relatively equally size forms" are necessary to achieve a "level of market performance comparable to a fragmented, structurally competitive market."[56]

The Commission's treatment of the Echostar merger is particularly instructive. The Commission opposed the merger on the basis that for "the vast majority of consumers, it would result in a reduction in the number of competitors from three to two or from two to one."[57] The Commission concluded that as a result "such a drastic reduction in the number of competitors

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[53] ITTA Forbearance Petition, 14 FCC Rcd 10816 ¶ 7 (1999).

[54] Ameritech-SBC Merger Order, 14 FCC Rcd 14712 ¶ 202(1999).

[55] *Echostar-DirectTV Merger Order*, 17 FCC Rcd 20559 ¶ 103 (2002).

[56] *2002 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13731 ¶ 289 (2003).

[57] *Echosta Merger Order*, at 20604, ¶ 99.

and concomitant increase in concentration create a strong presumption of significant anticompetitive effects."[58]

The Commission's observations regarding the number of firms necessary to constitute a fully functioning competitive market are consistent with the Department of Justice's Merger Guidelines. Commission policy clearly favors market structure where there are three or more competitors because duopoly markets "would decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers."[59] Such concentrated markets "inevitably result in less innovation and fewer benefits to consumers. That is the antithesis of what the public interest demands."[60]

Antitrust jurisprudence provides further support for the approach that the Commission must be confident that there are more than two facilities based competitors before finding a market structurally competitive. Antitrust law provides that a duopoly market is no better than a monopoly. In a duopoly, both firms, regardless of the allocation of market share have an incentive to exercise market power and have the incentive and means to maintain prices above competitive levels because "firms in a concentrated market ... in effect share monopoly power by recognizing their shared economic interests and their interdependence with respect to price and output decisions."[61] A "durable duopoly affords both the opportunity and incentive for both firms to coordinate to increase prices."[62]

In *Heinz*, the DC Circuit reversed the lower court's finding that the merger of the second and third largest firms in a three-firm baby-food market would increase the ability of the merged

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58 *Id.*

59 *Echostar Merger Order*, Powell Separate Statement.

60 *Id.*.

61 *Brooke Group v. Brown & Williamson*, 509 US 209, 227 (1993).

62 *FTC v. Heinz*, 246 F.3d 708, 725 (D.C. Cir. 2001).

firm to compete with the number one firm.[63] Likewise in *FTC v. Staples*, the court enjoined the merger of two competing office supply superstores where the merger would have left only one superstore competitor in 15 markets and only two competing superstores in 27 markets.[64] The court found that the merged entity "would allow Staples to increase prices or otherwise maintain prices at an anticompetitive level"[65]These cases are directly on point. The Commission cannot rely on a duopoly market conditions to restrain anticompetitive practices and pricing. The Commission certainly cannot, in effect, repeal the core provisions of Title II and sanction or ignore the resulting anticompetitive practices in which the ILECs, as a explained above, have strong incentives to engage.

In its most recent forbearance order, the Commission found that there were existing and emerging competitors to ILEC broadband offerings from cable companies, third generation wireless, satellite and power lines.[66] The Order further found that the unbundling obligations under § 271, even though not accompanied by an obligation to price elements at TELRIC rates, still served as a disincentive toward investment in broadband infrastructure.[67]

The Order further found that "competition from multiple sources and technologies in the retail broadband market, most notably from the cable modem broadband providers, will pressure

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[63] *Id.*

[64] *FTC v. Staples*, 970 F. Supp. 1066, 1081 (D.D.C. 1997).

[65] *Id.* at 1082.

[66] *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, CC Docket No. 01-338, *SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-235, *Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-260, *BellSouth Telecommunications, Inc., Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 04-48, Memorandum Opinion and Order, FCC 04-254, rel. Oct. 27, 2004 ¶ 22, ("*Section 271 Forbearance Order*").

[67] *Id.* ¶ 25.

the BOCs to utilize wholesale customers to grow their share of the broadband market and thus the BOCs will offer such customers reasonable rates and terms in order to retain their business.[68]

However, in that decision the Commission was evaluating whether BOCs should be required to provided unbundled access under Section 271 to broadband network elements for which the Commission had determined CLECs were not entitled under Section 251(c). The Commission relied in part on the possibility that CLECs could construct their own broadband facilities.[69] However, although this was incorrect even with respect to CLECs, there is no reason to believe that ISPs could do so. Therefore, that case provides no guidance for the evaluation of the instant BellSouth petition which would permit BellSouth to discriminate egregiously against both CLECs and ISPs. More importantly, "[w]here rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding."[70] Therefore, there is insufficient intermodal competition to warrant elimination or significant modification of *Computer Inquiry* safeguards.

3. The Commission Has Not Established Alternative Safeguards

Computer Inquiry safeguards are also necessary for the simple reason that the Commission has not otherwise established any safeguards designed to assure a competitive market for information services or addressed the potential legal and practical difficulties of doing so. While the Commission should not grant the requested forbearance in any event, the Commission may not do based on the unsupported promises of BellSouth that it will not harm competition.

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[68] *Id.* ¶ 26

[69] Id. ¶ 23-24.

[70] *FTC v. PPG Industries*, 798 F.2d 1500, 1503 (D.C. Cir 1986).

4. Price Cap Regulation Is Insufficient to Protect Against Cross-Subsidization

The Commission adopted the *Computer Inquiry* safeguards, to make "competitive abuses easier to detect and more difficult to accomplish."[71] However the Commission was adamant that it did not expect the safeguards themselves "to alter the incentives a carrier might have to engage in discrimination or cross-subsidization in [the] enhanced services ... markets."[72] The Commission also observed that competition in certain markets provided a limited degree of protection against cross subsidization but that the RBOCs "motivation to cross-subsidize" had not decreased because of limited competition."[73]

BellSouth obviously still retains those same incentives the Commission addressed in *Computer III*. BellSouth controls the vast majority of the market for facilities-based voice services in its region. While CLECs do compete in the local exchange and exchange access markets, existing competition is still not significant enough to discipline possible cross-subsidization of competitive services with monopoly profits. For example in the business market, carriers are still largely reliant on ILEC bottleneck facilities, as evident in the Commission's recently announced *Triennial Review Remand Order*.[74] In the residential market carriers have no alternative last mile facilities to residential customers and excessively rely on BellSouth's unbundled loops to reach those customers. Until further facilities-based competition takes root and breaks down BellSouth's monopoly in the local exchange and exchange access

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[71] *In the Matters of: Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof Communications Protocols under Section 64.702 of the Commission's Rules and Regulations*, Report and Order, 104 FCC2d 958 ¶ 13 ("*Computer III*").

[72] *Id.*

[73] *Id.* at 96.

[74] *See e.g., Triennial Review Remand* Press Release at 1-2; Separate Statement of Chairman Powell at 1.

market, BellSouth will retain the incentive to cross subsidize its broadband service with monopoly rents extracted from markets where it remains the monopolist.

BellSouth contends that the Commission's shift from rate-of-return regulation to price cap regulation after the Commission released *Computer III* eliminates the RBOC incentive and ability to cross subsidize competitive services, and broadband services in particular.[75] However, subsequent to the Commission's *Price Cap Order*,[76] the Commission adopted the *BOC Safeguards Order*, in which the Commission reiterated the need for the existing accounting safeguards that BellSouth complains about and even added safeguards against cross-subsidization despite the Commission's recognition that price cap regulation could reduce, if not eliminate, RBOC ability to cross subsidize.[77] Clearly then the Commission found that its policy of safeguarding consumers from cross subsidization of competitive services with monopoly services remained vital even with the shift to price cap regulation, and that existing safeguards were insufficient to deter cross subsidization.[78] Accordingly, there is no basis for the Commission to conclude that price cap regulation permits forbearance from long standing accounting rules designed to deter cross-subsidization.

5. RBOC Incentives to Harm Competitors Will Outweigh Incentives to Offer Wholesale Services

The Commission has consistently proclaimed that the best way to protect competition in the information services market is to ensure that information service providers have multiple

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[75] Petition at 24.

[76] Second Report and Order, *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786 (1990).

[77] Report and Order, *Computer III Remand Proceedings: Bell Operating Company Safeguards And Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571 ¶ 12 (1991).

[78] *Id.* ¶¶ 12-14.

wholesale alternatives to the telecommunications inputs that are necessary to provide their information services. As the Commission observed in the *Computer III Remand Further Notice*:

> Competition in the local exchange and exchange access markets is the best safeguard against anticompetitive behavior. BOCs are unable to engage successfully in discrimination and cost misallocation to the extent that competing ISPs have alternate sources of access to basic services. Stated differently, when other telecommunications carriers, such as interexchange carriers (IXCs) or cable service providers, compete with the BOCs in providing basic services to ISPs, the BOCs are less able to engage successfully in discrimination and cost misallocation because they risk losing business from their ISP customers for basic services to these competing telecommunications carriers.[79]

Currently these "competing telecommunications carriers" that ISPs are supposed to rely on themselves rely on telecommunications inputs from the same BOCs. Of course, as noted, the Commission has limited CLEC access to ILEC bottleneck facilities under 251. Therefore, the Commission may not find that there is sufficient competition to protect against BOC anticompetitive conduct.

B. The Requested Forbearance Would Harm Consumers

Section 10(a)(2) provides that the petitioner must demonstrate that the enforcement of such regulation or provision is not necessary for the protection of consumers.[80] Under this provision the Commission may deny a forbearance petition where there remains a "strong connection between what the agency has done by way of regulation and what the agency permissibly sought to achieve with the disputed regulation."[81] The D.C. Circuit rejected any suggestion that the term necessary in Section 10(a)(2) means that the regulation at issue is

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[79] *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket 95-20, *1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements*, CC Docket 98-10, Notice of Proposed Rulemaking, 13 F.C.C.R. 6040 (1998).

[80] 47 U.S.C. § 160(a)(2).

[81] CTIA, 330 F. 3d at 512.

"absolutely essential or indispensable."[82] In other words, a regulation may be "necessary" even though acceptable alternatives have not been exhausted.[83]

Using this framework for analysis the Commission retained the wireless local number portability rules despite its finding that the absence of number portability for wireless subscribers was not a total barrier to entry.[84] In this case the Commission's predictive judgment that consumers would switch carriers in higher numbers if their numbers were portable was sufficient justification for denying the forbearance.[85]

The Commission may also deny a forbearance petition when it finds there is the potential that competition will be reduced or rate increases may result from elimination of the provision or regulation.[86] In the *1999 Biennial Review Depreciation Order,* the Commission determined that:

> "Forbearance of the deprecation prescription process could potentially trigger large increases in ac carrier's deprecation expenses which could turn result in unwarranted increases in consumer rates. These increased deprecation expense and consumer rates would likely to continue for many years until robust competition curtails the ability of the incumbent LECs to secure these rates from consumers."[87]

BellSouth shamelessly contends the *Computer Inquiry* rules "affirmatively harm consumers" by raising costs, impeding competition and stifling investment. Each of these contentions is patently false.

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[82] *Id.* at 510.

[83] *Id.*

[84] *Id.* at 512.

[85] *Id.*

[86] *See 1998 Biennial Regulatory Review—Review of Deprecations Requirements for Incumbent Local Exchange Carriers,* 15 FCC Rcd 242, 267, ¶ 59 (1999).

[87] *Id.*

1. *Computer Inquiry* Safeguards Do Not Raise the RBOC's Costs

BellSouth claims that *Computer Inquiry* safeguards compliance costs approximately $45.28 per end user *utilizing BellSouth's broadband network.*[88] Of course this figure is simply irrelevant. While it is possible that BellSouth's *Computer Inquiry* obligations may cost $48.3 million its is impossible to understand how ALL of those costs can be attributed to end user customers that use BellSouth's broadband network, as BellSouth provides transmission services to ISPs that don't provide broadband services at all. Even if BellSouth's figures are accurate the larger question is what is the cost to the economy if the safeguards are eliminated. For all the reasons stated in these comments, those costs would be enormous. In addition BellSouth claims with respect to its services such as RBAN that it "must first make the underlying transmission functionality available to all ISPs and then develop the corresponding non-regulated enhanced services offering."[89] BellSouth cites to no rule or case supporting the proposition that it is required to use separate facilities or employees to make the required non-discriminatory offering of underlying transmission service. In fact, *Computer III* rules eliminated any requirement for structural separation and permitted BOCs to provide regulated and enhanced services on an integrated basis. The Commission has also eliminated the CEI filing and approval provisions for information services in 1999 to eliminate this precise problem.[90] In reality, BellSouth appears to be complaining about alleged affects of CPNI rules,

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[88] Petition at 21.

[89] Petition at 22.

[90] *See Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket 95-20, *1998 Biennial Regulatory Review—Review of Computer III and ONA* Requirements, CC Docket 98-10, Report and Order, 14 FCC Rcd 4289, 4303 ¶ 21 ("lag in bringing desirable services to the public makes it necessary to streamline the CEI requirements.")

not about *Computer Inquiry* rules.[91] Accordingly, BellSouth's complaints about the cost of compliance with *Computer Inquiry* safeguards are a fabrication.

2. *Computer Inquiry* Safeguards Promote Competition

Contrary to BellSouth's contentions, *Computer Inquiry* safeguards do not deter, but promote competition, by providing the essential regulatory underpinnings that will protect against ILECs' ability and incentive to disadvantage competitors. As stated elsewhere in these comments, BellSouth could potentially seriously harm independent VoIP providers Therefore, the Commission should conclude that forbearance would harm consumers by harming the competition that could bring lower prices and greater service choices.

3. *Computer Inquiry* Safeguards do not Stifle Investment

BellSouth goes to great length to suggest that the Commission should grant the petition because § 706 favors the promotion of broadband deployment as a statutory goal. However, even assuming forbearance would promote investment, the forbearance provisions of § 10 of the Act do not permit the imputation of Section 706 goals in derogation of the explicit statutory goals of § 10, namely protecting consumers and enforcing the mandates of the Act regarding just and reasonable prices and nondiscrimination. Moreover, Section 706 does not afford the Commission an independent grant of forbearance authority.[92] Therefore, even if it were the case that the safeguards stifled investment, the Commission may not use Section 706 to ignore the statutory standards for forbearance. Because BellSouth has not met the standards for forbearance, the Commission may not grant the petition based on Section 706 goals.

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[91] Letter from L. Barbee Ponder IV, BellSouth, to Marlene H. Dortch, WC Docket No. 02-33, August 12, 2004, pp. 10-11.

[92] *See Association of Communications Enterprises v. FCC*, 253 F.3d 662, 666, n. 7 (D.C. Cir. 2001).

In any event, BellSouth has offered no more than conclusory, unsupported allegations that *Computer Inquiry* safeguards harm investments. In fact, the evidence and announcements that BOCs have been, and are, investing in new broadband networks provides ample justification for the Commission rejecting BellSouth's contentions on this issue.

C. Forbearance Would Not Serve the Public Interest

The Commission may only forbear if the petitioner can demonstrate that the provision or regulation is no longer in the public interest. The Commission typically interprets the term public interest broadly. Because, as explained elsewhere in these comments, the requested forbearance would permit ILECs to harm competitors and consumers, it would clearly not serve the public interest to grant the BellSouth petition.

Moreover, central to the public interest analysis in Section 10(a)(3) is the impact of the proposed forbearance on competition among telecommunications carriers. Section 10(b) compels the Commission to "consider whether forbearance from enforcing the provision or regulation will enhance or promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[93] The Commission cannot grant forbearance relief under 10(a)(3) when removing a regulation will be harmful to "competition among providers of telecommunications services." BellSouth's petition presents exactly those kinds of harms.

BellSouth claims that its petition advances the public interest, referring to "goals" the Commission purportedly enunciated in the *Cable Modem Declaratory Ruling*[94] now on appeal to

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[93] 47 U.S.C 160(b).

[94] *Internet Over Cable Declaratory Ruling and Notice of Proposed Rulemaking*, GN Docket No. 00-185, CD Docket No. 02-52, FCC 02-77, released March 15, 2002.

the Supreme Court in *Brand X*.[95] BellSouth claims that elimination of *Computer Inquiry* safeguards and Title II regulation would make ILECs "a more effective competitor." As discussed elsewhere, data demonstrates that in the only market where cable has greater market share than the ILECs, the residential market, the ILECs added more new customers than cable in 2003. BellSouth further contends that 'no regulatory rule is necessary to ensure independent ISPs access to BellSouth's network."[96] This proposition flies in the face of 30 years of *Computer Inquiry* law at the Commission. Since *Computer I*, the Commission has continued to impose the fundamental principle of the *Computer Inquiry*, that facilities based carriers that provided bundled information service over their telecommunications facilities provide the transmission component of that information service on a nondiscriminatory basis to information service providers. Not once in the 30 years since *Computer I* has the Commission deviated from that core principle even for carriers that were non-dominant and lacked any market power.[97] There is certainly no precedent for the Commission to deviate from that principle in this instance, particularly for carrier or class of carriers that retain significant market power.

BellSouth claims that if freed from all Title II and *Computer Inquiry* safeguards it would negotiate "private carriage" arrangements with individual ISPs "tailored" to the unique circumstances of particular ISPs. There is no restriction, however, in the *Computer Inquiry* rules or in Title II that denies BellSouth this ability today. All that the *Computer Inquiry* rules require is that BellSouth make such deals available to other ISPs on a nondiscriminatory basis and that it tariff the transmission component. But that does not at all imply that BellSouth may not develop

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[95] *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

[96] Petition at 28.

[97] *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket 96-61, *1998 Biennial Regulatory Review --Review of Customer Premises Equipment And Enhanced Services Unbundling Rules In the Interexchange, Exchange Access And Local Exchange Markets*, CC Docket 98-183, 16 FCC Rcd 7418 (2001) ("*CPE Bundling Order*").

an offering that is well suited to a particular ISP in which other ISPs may have no interest. BellSouth's purported interest in serving smaller ISPs with DS1 interfaces rings hollow while elsewhere in its petition it complains about the burdens of providing ISPs access to its transmission services. Therefore, forbearance would not serve the public interest taking into account the impact of forbearance on competition.

D. There Is No Basis For the Commission to Forbear from the Core Statutory Provisions of Title II of the Act

In addition to forbearance from application of *Computer Inquiry* safeguards, BellSouth's petition recklessly suggests that the Commission can forebear from applying the full panoply of Title II common carrier obligations that govern BellSouth's provision of broadband service. BellSouth petition thus strikes at the very heart of Title II from the core provision of §§ 201-202 to the market opening provisions of §§ 251 and 271.

Sections 201 and 202, in conjunction with Section 208 represent the core consumer and competition preserving protections embodied in Title II. While the *Computer Inquiry* safeguards are deeply rooted in the prohibition against unjust and unreasonable practices and pricing in Section 201(b), and the limit on unreasonably discriminatory practices and pricing in § 202, there is a distinction between the prohibitions themselves and *Computer Inquiry* safeguards designed to more readily identify and stamp out anticompetitive behavior. It would be unprecedented for the Commission to completely eliminate the core obligations of Title II. The Commission has frequently deregulated common carrier services but has always maintained that the provisions of §§ 201 and 202 continue to apply and can be enforced through the complaint provisions of § 208.

In the *AT&T Non-Dominance Order*,[98] the Commission determined that AT&T, while non-dominant in the domestic interstate interexchange market would "still be subject to regulation under Title II," including Sections 201 and 202, and the Commission's complaint process set forth in Sections 206-209.[99]; Similarly in the *Pricing Flexibility Order* granting incumbent LECs subject to price cap regulation pricing flexibility for some of their interstate access charges, but noting the availability of Section 208 complaints to raise claims under Sections 201 and 202.[100]

Instead, BellSouth asks the Commission to obliterate the very foundation on which the Act was premised. The Commission to this day continues to require that carriers without market power comply with the obligations of §§ 201, 202 and 208 even where the market in which they operate is competitive. There is simply no precedent for such extraordinary relief. The same reasons that these comments have outlined above apply with equal if not greater force in opposition to BellSouth's shameless attempt to gut Title II of the Act and demonstrate that there is simply no basis for the radical surgery BellSouth asks the Commission to perform on the Act.

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[98] *AT&T Non-Dominance Order.* At 3282, ¶ 13.

[99] *Id.* ¶ 130.(declaring that the "status of AT&T as either a dominant or non-dominant carrier, therefore, does not alter its obligation to comply with" sections 201 and 202).

[100] Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 14 FCC Rcd 14221, ¶¶ 41, 65, 83, 127, 129, 131 (1999).

IV. CONCLUSION

For these reasons, the Commission should dismiss or deny the above-captioned petition.

Respectfully Submitted,

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